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EXAMINER
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FETSUGA, ROBERT M

ART UNIT	PAPER NUMBER
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3751

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Application Number: 10/055,513  
Filing Date: January 23, 2002  
Appellant(s): BRENNAN ET AL.

MAILED  
SEP 12 2006  
GROUP 3700

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Victor A. Cardona  
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed April 29, 2005  
appealing from the Office action mailed February 16, 2005.  
Reference to Rules 191/192 on page 1 of the brief is erroneous  
as the brief has been properly drafted in accordance with Rule  
41.37.

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**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

No amendment after final has been filed.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is deficient. 37 CFR 41.37(c)(1)(v) requires the summary of claimed subject matter to include: (1) a concise explanation of the subject matter defined in each of the independent claims involved in the appeal, referring to the specification by page and line number, and to the drawing, if any, by reference characters and (2) for each independent claim involved in the appeal and for each dependent claim argued separately, every means plus function and step plus function as permitted by 35 U.S.C. 112, sixth paragraph, must be identified and the structure, material, or acts described in the specification as corresponding to each claimed function must be set forth with reference to the specification by page and line number, and to the drawing, if any, by reference characters. The brief is deficient because reference to the surface as "(21, FIG. 4; page 7)" in each of the "aspect" paragraphs apparently should read --(20, FIG. 2, page 4)-- to

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be consistent with the elected embodiment and the instant specification (par. 0018). Also, in the "second aspect" paragraph, reference to the air and water sources as "95" and "85" should read --connected to conduit 95-- and --connected to conduit 85-- (or equivalent) to be consistent with the instant specification (par. 0019).

#### **(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is substantially correct. The changes are as follows: In ground 4, the claim listing should read --1-10, 16-18, 21-23 and 28-32--.

#### **(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

#### **(8) Evidence Relied Upon**

6,182,303	Gardenier et al.	02/2001
3,345,982	Guiler	10/1967
1,982,259	Martin	11/1934

#### **(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims (numbering as presented by appellant's):

1. Claims 1-18, 21, 23-32, 34-36, 40 and 41 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the

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inventor(s), at the time the application was filed, had possession of the claimed invention.

Claim 1 recites a body "immovable and affixed to said surface during operation". This subject matter is not described in the originally filed disclosure and is therefore considered to be new matter. Claims 24, 28, 34 and 40 similarly recite the noted subject matter.

2. Claims 1-5, 7, 10, 18, 21, 22, 24, 25, 28, 29, 31, 32, 34-36 and 40, as best understood, are rejected under 35 U.S.C. 102(a)/(e) as being anticipated by Gardenier et al.

The Gardenier et al. (Gardenier) reference discloses a hydrotherapy tub comprising (claim 24): an inner surface 11 including an opening (receiving 50); an air source/means (col. 3 lns. 6-9); a water source/means (col. 3 lns. 6-9); a body 10 including a first chamber 16 and a second chamber 18; a plurality of outlets/means 20,22; a water inlet 14; and an air inlet 12, as claimed. Re claim 1, the Gardenier body appears to be "immovable and affixed to said inner surface during operation" in the same sense as with appellants' disclosed invention. Note lines 8-22 in column 5 of Gardenier. Re claim 7, note column 6, lines 6-9. Re claim 10, note column 6, lines 60-63.

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3. Claims 1-10, 18, 21-23 and 28-32, as best understood, are rejected under 35 U.S.C. 102(b) as being anticipated by Martin.

The Martin reference (Figs. 7-10) discloses a fluid flow system comprising (claim 1): a body 59 including a water inlet 5, an air inlet 6, a first chamber 68, a second chamber 69, and a plurality of perpendicular outlets/means 75, as claimed. Re claim 1, the Martin body is capable of being used with a tub having an opening (e.g. in the bottom) as functionally recited. Furthermore, should one decide to insert the air and water inlets 5,6 through such an opening, the body would then cover the opening and be "immovable and affixed to said inner surface during operation" in the same sense as with appellants' disclosed invention. Further in this regard, the body 59 is disclosed by Martin as being stationary (pg. 3 lns. 58-59). Re claim 18, note page 5, lines 46-52.

4. Claims 1-10, 16-18, 21-23 and 28-32, as best understood, are rejected under 35 U.S.C. 103(a) as being unpatentable over Martin.

Re claim 16, although the air outlets 75 are not located inside the water outlets 74, as claimed, it would have been obvious to one of ordinary skill in the art to reorient the air and water outlets as merely involving a reversal of parts where operation of the hydrotherapy tub would not be materially

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affected. Moreover, the Figs. 12 and 13 embodiment of Martin evidences utilizing air outlets 139 located inside water outlets 140.

5. Claims 1-10, 16-18, 21-32, 34-36, 40 and 41, as best understood, are rejected under 35 U.S.C. 103(a) as being unpatentable over Martin as applied to claims 1 and 16 above, and further in view of Gardenier.

Re claim 24, the Martin fluid flow system is installed in a hydrotherapy tub 39. Therefore, Martin discloses all claimed elements except for the tub including an opening.

Although the inlets to the body of the Martin hydrotherapy tub do not extend through an opening, as claimed, attention is directed to the Gardenier reference which discloses an analogous hydrotherapy tub which further includes inlets 12,14 to a body 10 that extend through an opening (receiving 50). Therefore, in consideration of Gardenier, it would have been obvious to one of ordinary skill in the hydrotherapy tub art to associate an opening with the Martin hydrotherapy tub in order to facilitate installation of the body by concealing the inlets from view.

6. Claims 11-15, as best understood, are rejected under 35 U.S.C. 103(a) as being unpatentable over Martin either alone or taken with Gardenier as applied to claims 1 and 16 above, and further in view of Guiler.

Although the injectors 74,75 of the Martin hydrotherapy tub do not include conical structures, as claimed, attention is directed to the Guiler reference which discloses an analogous hydrotherapy tub which further includes an injector 2 having a conical structure 18. Therefore, in consideration of Guiler, it would have been obvious to one of ordinary skill in the hydrotherapy tub art to associate conical structures with the Martin injectors in order to increase flow velocity.

**(10) Response to Argument** (numbering as presented by appellant's)

1. Appellant's argue at pages 5-6 of the brief one skilled in the art would understand the noted claim language to be supported by the depiction in Fig. 2 of sidewalls 250 and nut 260. The examiner can not agree. Clearly, the sidewalls 250 are illustrated as part of the tub in Fig. 2 (and Fig. 4 as well). This depiction is consistent with appellants' specification, including paragraph 0029 referenced at page 6 (1<sup>st</sup> and 2<sup>nd</sup> pars.) of the brief. However, absent any disclosure as to how the sidewalls 250 are attached to the body 11, an "immovable and affixed" feature is not evident from the illustration in Fig. 2. The examiner does acknowledge the disclosure in paragraph 0030 argued at pages 6-7 of the brief where alternative examples/embodiments are discussed. While the



terms "affixed/affixes" are present in this paragraph referring to such ideas as epoxy and a recess, this discussion does not reference any drawing figure. In this regard, Fig. 2 clearly illustrates body 11 as being separated from a tub wall/surface 20 that does not include any recess. Furthermore, presence of the term "immovable" in the instant specification has not been anywhere indicated by appellant's. It would seem reasonable that if appellant's originally considered preventing the public from gluing a body 11 to a tub wall or placing it in a recess, some sort of disclosure would be present associating the "immovable and affixed" language of the claims with that subject matter. In sum, the ambiguous disclosure of the instant invention does not show appellant's possessed immovability of the body 11 as recited in the claims in a manner that would be evident to one skilled in the art.

2. Appellant's argue at page 8 of the brief (3<sup>rd</sup> par.), and again at page 9 (1<sup>st</sup> and 2<sup>nd</sup> pars.), Gardenier does not teach a plurality of outlets that receive air and water from two chambers. The examiner can not agree, and notes the direct correspondence (discussed supra) between the plain language of the claims and the Gardenier disclosure. Appellants' broad claim language does not specify that each outlet communicates with both chambers, and therefore, does not distinguish

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Gardenier. Appellant's argue at pages 8-9 of the brief claim 1 recites "a first plurality of outlets in fluid communication with a first chamber and second chamber...". However, since the examiner could not find this limitation in claim 1, this argument is considered moot.

3. Appellant's argue at pages 10-11 of the brief Martin does not teach the intended use of the claimed fluid flow system. The examiner can not agree, and notes the direct correspondence (discussed supra) between the plain language of the claims and the Martin disclosure. Simply stated, the structure of the claimed fluid flow system is fully met by the structure of the Martin fluid flow system. Appellant's have not pointed to any error in this finding of fact. Indeed, appellant's appear to rely upon unfounded assertions (pg. 10 2<sup>nd</sup> par.) to support patentability of claim 1 over the Martin disclosure. In this regard, the record of the instant application does not support appellant's characterization that the tub drain opening in Martin was equated with the "opening" functionally recited in claim 1. Appellant's argue at page 11 of the brief (1<sup>st</sup> and 2<sup>nd</sup> pars.) the Martin fluid flow system is not "affixed" to the hydrotherapy tub. Notwithstanding this term not being supported by the instant disclosure (note discussion supra), claim 1 (for example) does not specify any device (in operation or not)

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positively affixed to a tub surface. Therefore, this argument is considered moot as being more narrow than the actual claim language. Appellant's further argue at page 11 of the brief (3<sup>rd</sup> par.) page 5, lines 46-52 of the Martin disclosure does not relate to claim 18. The examiner can not agree. Claim 18 recites a particular orientation of the two chambers relative to each other (last two lines), and Martin discloses alternative chamber orientations. Appellant's still further argue at page 11 of the brief (4<sup>th</sup> par.) Martin does not disclose a Venturi effect as recited in claim 8. The examiner can not agree, and notes page 1, line 34 in Martin.

4. Appellant's argue at page 12 of the brief reversal of the orientation of the air and water outlets would require "wholesale reconstruction" of the flow system which is not taught by Martin. The examiner can not agree, and again notes the embodiment of Figs. 12-13 in Martin where differently oriented outlets are in fact disclosed. These differently oriented outlets do not appear to involve any more "reconstruction" of the flow system than that which would be afforded appellant's when considering the instant specification at paragraphs 0019 and 0020.

5. Appellant's argue at pages 13-15 of the brief perceived deficiencies of the Martin reference individually, however,

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nonobviousness can not be established by attacking references individually when a rejection is predicated upon a combination of prior art disclosures. In this regard, the Gardenier disclosure is properly combined with the Martin disclosure for the reasons advanced supra. Appellant's offer at page 15 of the brief (1<sup>st</sup> par.) a conclusion that the Martin and Gardenier disclosures are not properly combinable, without actually addressing the Gardenier disclosure. This argument is considered moot absent any indication by appellant's as to why one skilled in the art would not consider running the water and air inlets of the Martin body through an opening in a tub as taught by Gardenier. Indeed, it would appear to be a simple matter to extend the water 5 and air 6 inlets of Martin through the opening (receiving 50) taught by Martin. Appellant's argue at pages 15-17 of the brief rejections in a March 31, 2004 Office action. However, the instant appeal is from the Office action of February 16, 2005 as correctly noted on page 1 of the brief. Appellants' remaining arguments at pages 17-19 of the brief have been fully considered and either have been previously addressed or are not deemed persuasive in view of the prior art as specifically applied in light of the level of skill in the pertinent art.

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6. Appellant's argue at pages 20-21 of the brief there is no motivation for combining the Martin and Guiler disclosures. The examiner can not agree. Guiler has been relied upon for teaching an ejector 2 having a conically shaped end 18. The conical end 18 increases flow velocity through the ejector 2 to enhance hydrotherapy fluid flow as appellant's have acknowledged at page 20 of the brief. In Martin, hydrotherapy fluid flow is created by ejectors 74,75 having a tubular end (pg. 3 lns. 102-106). Given these facts, one skilled in the art would find ample motivation to provide a conical end, as taught by Guiler, on the Martin ejectors for the purpose of enhancing hydrotherapy fluid flow. The resulting fluid flow system would include a chamber comprising "a plurality of conical structures" as recited in claim 11 as the chamber 68 in Martin can be said to "comprise" the ejector portion 74 (see Figs. 3 or 13 for structural details) in the same sense as with appellant's disclosed invention.

**(11) Evidence Appendix**

No evidence appendix was included with the brief. Since there is no evidence submitted in the record of the instant application, it is assumed appellant's meant to include the proper appendix with a statement of "NONE".

**(12) Related Proceedings Appendix**

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No related proceeding appendix was included with the brief. Since there is no indication of a related proceeding found in the record of the instant application, it is assumed appellant's meant to include the proper appendix with a statement of "NONE".

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

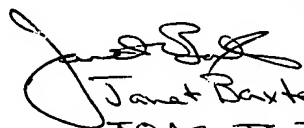
  
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